82-1545

No

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RICHARD C. KAISER, PETITIONER,

v.

CONSOLIDATED RAIL CORPORATION,

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the federal common law should allow the doctrine of collateral estoppel to bar any subsequent proper refiling of an action, where said action was originally dismissed for a failure to join a necessary party?

2. How should the conflict between the 6th, 9th, 7th and 4th Circuits be resolved concerning the jurisdiction of the National Railway Adjustment Board?

3. Does due process prescribe that a person having a legal claim for injury be forced to submit said claim to an arbitor appointed by the claimant's adversaries?

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Miscellaneous:

OPINIONS BELOW

There is no opinion for the Sixth Circuit Court of Appeals in this cause. That Court summarily affirmed the order and opinion of the United States District Court for the Nothern District of Ohio, Western Division. (App., p.22)

JURISDICTION

Review is sought in this cause pursuant to authority found in 28 U.S.C. Section 1254(1) of the decisions of the United States Court of Appeals for the Sixth Circuit entered October 21, 1982, which was finalized by the denial of a timely request for rehearing dated December 16, 1982. (App., p.37)

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure 8, 19, 21 and 41(b). See Appendix.

United States Code Title 45, Sections 151-153. See Appendix.

STATEMENT OF THE CASE

Richard C. Kaiser, petitioner herein, was hired by the New York Central Railroad in 1967 and worked as a fireman for six and one-half years for the New York Central and then the Penn Central Transportation Co. This "closed shop" required him to join a union. He joined the Brotherhood of Locomotive Engineers which negotiated collective bargining contracts with his employer and represented him pertaining to contract grievances.

On May 28, 1967, petitioner was seriously injured by the admitted negligence of his employer. While still receiving

substantial medical treatment for these injuries, petitioner was discharged from employment and denied further medical benefits.

He was discharged for failure to take and pass scheduled exams for promotion to engineer despite having successfully taken and passed six promotional exams during the prior two years. He was discharged under claim of suffering present serious medical disability (having recently undergone several hospital surgeries for medical complications directly related to his prior work injury), under claim that he should not have been denied requested medical execuses from examination as authorized by contract, under claim that the time periods specified by contract to be between promotion exams was not followed, and under claim that he was forced under duress while suffering serious medical disability to take an exam

and was fired that day.

Following discharge, petitioner personally contacted his Union Local Chairman concerning his discharge and the filing of a grievance.

His employer failing to reinstate his employment and his union failing to timely process his grievance, petitioner sought legal redress.

On December 5, 1975, petitioner filed suit in district court against his employer Penn Central Transportation Co. The complaint alledged, primarily, that his discharge of December 5, 1973, was a breach of contract.

Subsequently, petitioner amended the complaint by further alleging a breach of the duty of fair representation by his union without making it a party. This case was dismissed upon employer's motion for a lack of jurisdiction. The court reasoned that these contract disputes are within the

exclusive jurisdiction of the National Railway Adjustment Board (comprised of members from his employer and his union) under Section 3 of the Railway Labor Act, 45 U.S.C. 153. (App., p.39)

On May 29, 1977, petitioner filed his submission with the National Railway Adjustment Board, First Division, against his employer Pen Central. This was decided adversly on September 3, 1981. (App., p 35)

Almost two years before the NRAB made its decision, petitioner again sought legal redress because he was concerned about his opportunity to obtain a fair decision of his case and a determination that filing with the NRAB was not essential to judical review.

On December 5, 1979, petitioner commenced a second action in the same court against the successor to his employer, Consolidated Rail Corporation, for breach of

contract and, for the first time, against the Brotherhood of Locomotive Engineers for breach of duty of fair representation for failure to process his grievance. The complaint alledged primarily the same facts as did the first suit, but made the union a party defendant. The second case was dismissed upon motions of both defendants for different reasons. (App., p.26)

The complaint against the employer was dismissed for lack of jurisdiction under the doctrine of res judicta and collateral estoppel in that the first action was essentially the same as the second. Petitioner argued that the presence of the union as a party defendant combined with a claim of breach of duty of fair representation brings this cause within the Glover exception to the exclusive jurisdiction of the National Railway Adjustment Board.

Jurisdiction in the district court

is based upon the cases of Glover v. St. Louis-San Francisco R. Co., 396 U.S. 324 (1969) and Vaca v. Sipes, 386 U.S. 171 (1967).

The suit against the union was dismissed upon motion for summary judgment under Federal Rule 56(e) for not having met the burden of producing affidavits or other materail to establish a genuine issue of fact.

From the district court's application of the law appeal was taken to the court of appeals, which affirmed summarily and later denied a timely petition for rehearing. (App., p 37)

REASONS FOR GRANTING THE WRIT

Petitioner presents four reasons for the allowance of the writ.

1. The decision appealed from involves an important federal law question which should be settled by this Court alone.

The question is, should the modern concept of collateral estoppel include barring any claim where there was a non-joinder error?

In the instant case, a district court has set the following precedent: A prior dismissal for a failure to join a necessary party (not an indispensable party) can forever foreclose legal remedy in the district courts on the same cause.

This precedent was justified by applying the legal concept of collateral estoppel to a party's cause, where the first complaint had been dismissed for failure to join a necessary party.

Collateral estoppel is a judical doctrine modernized to achieve substantial justice. See Allen v. McCurry, 101 S. 411, 414, 415, and Blonder-Tongue Labs. v. University Foundation, 402 U.S. 331,322(1971).

In the instant case substantial justice

is not being served. Here, a technical non-joinder defect has been interpreted to finally determine the court's jurisdiction over a cause of action. Such an interpretation via collateral estoppes makes a curable defect fatal. Surley such an interpretation is not in the interest of substantial justice.

This Court has tacitly approved the commonly recognized principle that jurisdictional dismissals do not bar further litigation of a cause of action when a subsequent complaint cures the jurisdictional defect. See Etten v. Lovell Mfg. Co., 225 F.2d 844, 846, 3rd Cir. (1955), cert denied, 350 U.S. 966 (1956) and Smith v. Pittsburg gage and Supply Co., 464 F.2d 870, 3rd Cir. (1972).

Such a change in the law elevates collateral estoppel to the level of res judicata (e.g. a complete adjudication of the merits), affecting the common legal understanding of finality of litigation.

Attorneys across this land will no longer know what the difference is between collateral estoppel and res judicata for, in this case, issue preclusion has become a meritorious determination of a cause of action.

For these reasons alone this Court should decide what the modern limits of the doctrine of collateral estoppel should be.

2. The decision of the district court is so inconsistent with the decisions of this Court as to warrant plenary review.

This Court has directed the district courts to follow certain rules of law as authorized in the Federal Rules of Civil Procedure. See Federal Rule 1 and this Court's orders of adoption and admendment.

Federal Rules of Civil Procedure 8, 19, 21, and 41(b) deal with this Court's decisions and policies concerning problems

involving joinder of parties. Rule 8 establishes the general policy that pleadings are notice in nature. (App., p. 38) Rule 19(a)(b) makes it clear that complaints are to be dismissed only if parties are indispensable and cannot be brought in (there was no determination of indispensability by the first court in this case). Rule 21, does not make misjoinder a ground for dismissal of an action, and in fact encourages parties to be added or dropped. (App., p. 38) Rule 21 also allows any claim against a party to be severed and proceeded with separately. Rule 41(b) goes on to establish that a dismissal for failure to join a party is excepted from a determinationtion upon the merits. (App., p. 38)

The thrust of all these rules expresses this Court's decision not to make non-joinder itself a defect sufficient to evoke the sanctions of res judicata and collateral

estoppel.

Many courts, following the Federal Civil Rules, have found that a dismissal for lack of jurisdiction does not constitute adjudication of the merits. See Saylor v. Lendsley 391 F.2d 965, 2nd Cir. (1968), Eldridge v. Richfield Oil Corp., 364 F.2d 909, 9th Cir. (1966), cert. denied, 87 S. Ct. 750, Silvertown v. Valley Transit Cement Co., D.C. Cal, (1955), 140 F Suoo. 709, Williams v. Minnesota Min. & Mfg. Co., S.D. Cal., 14 F.R.D. 1 (1953), Korvettes Inc. v. Brous, 617 F.2d 1021, 3rd Cir. (1980, International Video Corp. v. Ampex Corp., 484 F.2d 634, 9th Cir. (1973).

In fact, the currently accepted statement of the law found in the Restatement of Judgments 2d, Sec. 20(1)(a) allows a proper refiling for failure to join a necessary party. (The Restatements of Judgments has been recognized by this Court in Blonder-

Tongue Laboratories, Inc. v. University Foundation, 402 U.S. 331, 322 (1971), and in Montana v. United States, 440 U.S. 147, 154 (1979).

It is also clear that collateral estoppel applies only to the issue determined. See Montana v. United States, id at 153. In the instant case that issue was whether a party was necessary. Yet the second court barred the cause when this issue no longer existed, e.g. the party was present.

For these reasons the district court's decision is so inconsistent with this Court's decision on how res judicata and collateral estoppel are to be applied, that this Court should exercise its plenary power of review in order to assure that its decisions and opinions are followed.

3. In addition, here a federal court of appeals has rendered a decision which

sanctions a departure by a lower court from the holdings of this Court in specifically Glover v. St. Louis-San Francisco R. Co. 393 U.S. 324 (1969), and Vaca v. Sipes, 386 U.S. 171 (1967), so as to call for an exercise of this Court's power of supervision.

In Glover this Court held that federal courts have jurisdiction over actions which essentially involve a dispute between some employees, on the one hand, and union and management together, on the other, and not a dispute between employees and a carrier concerning the meaning of the terms of a collective bargaining agreement, over which the Railroad Adjustment Board would have exclusive jurisdiction under the Railway Labor Act. It also held that, in a case where resort to contractual or administrative remedies would be wholly fruitless, a petitioner's failure to exhaust such remedies constitutes no bar to judical review of his

claims.

Vaca held in part that federal district courts have jurisdiction over disputes between a railroad employee, his union, and his employer for a breach of the duty of fair representations by his union and a breach of contract by his employer.

In the instant case the petitioner, a railroad employee, did bring an action alleging a breach of contract by his employer and alleged that his union had breached its duty to fairly represent him.

The District Court's rationale in this case supports a departure from the holdings of Glover and Vaca in that before any railroad employee can seek jurisdiction in the federal district courts he or she must properly join his or her union in the first complaint or run the risk of losing his or her district court remedy. Such a high risk severely limits the thrust of Glover and Vaca,

forcing railroad employees who have serious disputes with their employer and union to submit their claims to NRAB arbitrators who are appointed by the claimant s adversaries.

Such a departure is inconsistent with the substantial justice remedy provided by Glover and Vaca, and call for an exercise of this Court's supervisory authority over the lower federal courts.

4. The decision appealed from conflicts with the decision of other Circuits as to the jurisdiction of the National Railway Adjustment Board.

In the instant case the District Court, sub judice, recognized the Glover-Vaca exception to the jurisdiction of the NRAB. It tacitly implied that the exception exists. in doing so, this case is in conflict with the 4th Circuit which has decided to follow the preclusion interpretation of Andrews v.

Louisville & Nashville R. Co., 406 U.S. 320 (1972). See Dorsey v. Chespeak and Ohio Railway Company, 476 F.2d 243, 4th Cir. (1973).

The 2nd and the 9th circuits are also in conflict with the 4th Circuit. They have held that Andrews is not a bar to district court jurisdiction over Glover-Vaca exception to the jurisdiction of the NRAB. See Schum v. South Buffalo Railway Co., 496 F.2d 328, 2nd Cir. (1974), and Otero v. Inter-National Union of Elec. R. and M. Wkrs., 474 F.2d 3, 9th Cir. (1973).

This conflict essentially invloves a disagreement among courts of appeals as to whether the Glover-Vaca exception exists in light of Andrews. This is an inportant and recurring question that warrants plenary review. The granting of certiorari in this case will resolve this conflict.

Respectfully submitted,

_____

Vesper C. Williams 11
Counsel for Petitioner

_____

Francis X Beytagh
Of Counsel

APPENDIX A

No. 81-3290

FILED
Oct. 21, 82

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CORCUIT

Richard C. Kaiser,
Plaintiff-Appellant, :

VS. : ORDER

Consolidated Rail Corporation :
f/k/a/ Penn Central Trans. Co.
Rrotherhood of Locomotive :
Engineers,
Defendant-Appellees :

BEFORE: ENGEL AND MERRITT, CIRCUIT JUDGES; District Judge*.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudical error intervened in the judgment and proceedings in the district court, and it is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

Signed

The Honorable Westley E. Brown, Senior United States District Judge for the District of Kansas, sitting by designation.

ISSUED AS MANDATE: Jan. 4, 1983
costs: None

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF OHIO
WESTERN DIVISION

RICHARD C. KAISER, Plaintiff	)	No. C 75-480
-VS-	)	
PENN CENTRAL TRANS. CO., Defendant	)	OPINION AND ORDER

* * *

WALINSKI, J:

This cause is before the Court on the defendant's motion to dismiss for lack of jurisdiction pursuant to Fed. R. Civ. P. 12 (b)(1).

An examination of the pleadings and affidavits establish that prior to December 5, 1973, the plaintiff was employed by defendant Penn Central TRansportation company (hereafter Penn Central) as a fireman. On that date, he was discharged by the defendant. Plaintiff alleges that immediately after receiving the notice of discharge he contacted his union representative and informed him of the facts surronding the event. It was apparently his belief that the union was to process his grievance and appeal. During the two and one-half year period between his discharge and the filing of this suit, the plaintiff made several contacts with a representative of the union about his grievance and appeal. Despite those repeated communications, the union took no action on his grievance.

Purpoting to base jurisdiction of 28 U.S.C., 1332, the plaintiff filed this suit, seeking both damages and reinstatement,

alleging breach of the collective bargaining agreement between Penn Central and the Brothethood of Locomotive enggineers. Although the plaintiff alleges that the union breached its duty of fair representation, the union was not joined as a defendant.

Penn Central, in its motion to dismiss, asserts that despite the plaintiff's attempt to base jurisdiction on diversity of citizenship, the suit is governed by the Railway Labor Act, 45 U.S.C., 151 et seq. Pen Central argues that the dispute involves here is a "minor dispute", or grievance within the meaning of th Railway Labor Act. Its argument continues that since the dispute is minor, the Court is without jurisdiction to entertain the merits.

Plaintiff, on the other hand, asserts that this suit is not within the exclusive jurisdiction of the Railroad Adjustment Board because of the union's breach of its duty of fair representation.

For the reasons set forth below, the Court is satisfied that the dispute involved herein is a "minor" dispute within the exclusive jurisdiction of the Railroad Adjustment Board, and that the defnednat's motion to dismiss should be granted.

Under 3 of the Railway Labor Act, 45 U.S.C., 153. if the dispute involved is a "minor" dispute, or grievance, and the parties have been unable to reach a voluntary resolution then the National Railroad Adjustment Board has primary and exclusive jurisdiction to interpret the collective bargaining agreement and issue an appropriate award. Local 1477 United Transportation Union v. Baker, 482 F.2d 228 (6th Cir. 1973); see Elgin J. & E. Ry. v. Burley, 325 U.S. 711 (1945). A determination that the dispute

involved herein is minor would therefore leave this Court with jurisdiction.

It is now well settled that a dispute involving an employee's claim against his employer that he was discharged in violation of the collective bargaining agreement is a minor dispute or grievance. Andrews v. Nashville Railroad Co., 406 U.S. 320 (1972). As such, the plaintiff's claim is subject to the Railway Labor Act's requirement that it be submitted to the Railroad Adjustment Board for resolution. Section 3 First (i) of the Railway Labor Act, 45 U.S.C., 153 First (i).

Plaintiff neverless contends that there is an exception to this rule when there is an allegation that the union has breached its duty of fair representation to the employee. For this proposition he cites, inter alia, Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324 (1969).

In Glover, supra, the plaintiffs, a group of blacks and whites employees, brought suit for damages and injunctive relief agaonst both their employer railroad and their union. They alleged that the defendants were acting in concert to bar all of the plaintiffs from promotion solely to avoid having to promote any of the blacks. The district court granted the defendant's motion to dismiss holding that the dispute was within the wxclusive jurisdiction of the Railroad Adjustment Board. The Fifth Circuit Court if Appeals affirmed. 386 F.2d 452 (1967).

Reversing the Circuit Court, the Supreme Court held "that Sec. 3 First (i) by its own terms applies only to disputes between an employee or group of employees on a carrier or carriers." Glover, supra, quoting Conley v. Gibson, 355 U.S. 41, 44 (1957).

And the Court noted further;

> Moreover, although the employer is made a party to insure complete and meaningful relief, it still remains true that in essence the "dispute" is one between some employees on the one hand and the union and management together on the other, not one "between an employee or group of employees and a carrier or carriers."

Glover, supra, 393 U.S. st 329.

Here, howerer, the suit involves simply a "minor" dispute "between an employee* * * and a carrier* * *." The union is not a party to the dispute, and the exception to the general rule found in Glover is not applicalbe. See Hill v. Southern Railway Co., 402 F. Supp. 414 (W.D. N.C. 1975) (union not made a party to suit). See also, Schum v. South Buffalo Railway Co., 496 F.2d 328 (2d Cir. 1974) (defendant union charged with breach of duty of fair representation).

As thedefendant points out in the affidavit of Richard Ellenberger, the plaintiff has an adequate and existing remedy before the National Railway Adjustment Board. Furthermore, that board is a neutral arbiter from whom the plaintiff can expect an unbiased decision. See Sec. 3 First, Railway Labor Act, 45 U.S.C., 153 First, for composition of board. Finally, at the hearing before the board, the plaintiff has the right to be represented by counsel and need not rely on his union to supply representation. 45 U.S.C., 153 First (j).

For the foregoing reasons, it is accordingly ORDERED that the defendant's motion to dismiss should be, and hereby is, granted, and that the complaint should be,

and hereby is, dismissed.

signed
United States District Judge

Toledo, Ohio
August 5, 1976.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Richard C. Kaiser,
Plaintiff
vs.

Consolidated Rail Corp.
f/k/a Penn Central
Trans. Co., et al.,
Defendants

Case No C 79-712

OPINION AND ORDER

YOUNG, J.:

This cause came to be heard upon the filing by defendant Consolidated Rail Corporation ("Conrail") of a motion to dismiss. Also, defendant Brotherhood of Locomotive Engineers ("Union") has filed a motion to dismiss or, in the alternative, for summary judgment. Plaintiff has now filed an opposition to thes motions, only at the urging of the Court in its July 14, 1980 order.

This is an action for breach of a collective barganing agreement between the Penn Central Transportation Co. ("Carrier")

and the Brotherhood of Locomotive Firemen & Engineermen ("BLF&E"). The amended complaint alleges that the defendant Carrier discharged plaintiff on December 5, 1973, in violation of the terms of the collective bargining agreement. The amended complaint charges the Union with a breach of duty of fair representation in connection with the Union's alleged failure to process plaintiff's grievance concerning the December 5, 1973 discharge.

Defendant Conrail's Motion to Dismiss

Defendant Conrail first moves to dismiss on the ground that Conrail is not the proper defendant and is not liable in its own right for a breach of contract occuring in 1973. Defendant contends that Conrail did not begin operations as a rail carrier until April 1, 1976, purauant to the Final System Plan prepared under 206 of the Regional Rail Reorganization Act, as amended, 45 U.S.C. 716. Defendant Conrail concludes that any liability in the present case remains a preconveyance obligation of the estate of the Penn Central Transportation Company under 45 U.S.C.774(e).

Subsequent to the defendant Conrail's motion to dismiss, plaintiff has filed an amended complaint purporting to divert plaintiff's claim on to Penn Central. It is unclear, however, whether the amended complaint successfully names Penn Central as a party defendant. Nevertheless, this Court finds that Penn Central is the proper party defendant and that 45 U.S.C. 774(e) designates Conrail as the processing agent for claims of employees arising under the collective bargaining agreement of defendant Penn Central.

Defendant Conrail next move for dismissal on the ground that plaintiff's present lawsuit is barred by the principles of res judicata and collateral estoppel. Defendant contends that plaintiff filed an identical claim arising out of the December 5, 1973 discharge before Judge Walinski entitled Richard C. Kaiser V. Penn Central Transportation Co., No. 75-480. The complaint in that prior case alleges the same cause of action as in the present case, i.e. that plaintiff's December 5, 1973 discharge violated the terms of the collective bargaining agreement. An amendment to that complaint also charged the Union with a breach of duty of fair representation, but failed to name the Union as a party defendant. Motion to dismiss Appendix A. In an opinion and order dated August 5, 1976, Judge Walinski dismissed plaintiff's action for lack of jurisdiction. Uudge Walinski held that plaintiff's complaint stated a "minor dispute," that is a contraversy over the meaning of an existing collective bargaining agreement. The Judge concluded that such "minor disputes" are within the exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB") under 3 of the Railway Labor Act, 45 U.S.C. 153.

Subsequent to Judge Walinski's opinion, plaintiff, through his attorney, filed a claim with the NRAB, First Division, on May 28, 1977. An oral hearing was held on January 25, 1978 at which both plaintiff and his attorney appeared befor the Board. Affidavit of A.W. Paulos. To date, no decision has been rendered by the Board.

Plaintiff has now filed this lawsuit involving the very same cause of action as

did the prior case. Both complaints allege that plaintiff's rights under the collective bargaining agreement were infringed by Penn Central's termination of plaintiff's employment on December 5, 1973. Both cases, in reality, involve the same parties, plaintiff Kaiser and defendant Penn Central.

Both lawsuits charg the Union with a breach of duty of fair representation. The only technical difference between the two lawsuits is that the present amended complaint actually names tha Union as a party defendant. Plaintiff contends that the presence of the Union as a party defendant, combined with a claim of breach of duty of fair representation, brings this claim within the Glover exception to exclusive jurisdiction of the NRAB. Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 326 (1969).

This Court finds that plaintiff's jurisdictional arguments regarding the Glover exception are barred by the doctrine of collateral estoppel. This precise jurisdictional issue was actually raised and decided by Judge Walinski in the prior action. The plaintiff raised the issue of the Union's alleged breach of duty of fair representation in the prior lawsuit, both in his amendment to the complaint and in his motion for reconsideration of Judge WAlinski's final opinion and order. Judge Walinski carefully considered the Glover exception and, yet, concluded that the complaint stated a "minor dispute" within the exclusive jurisdiction of the NRAB. Judge Walinski necessarily held that plainitff's conclusory allegations of breach of duty of fair representation were insufficient to give this Court jurisdiction of plaintiff's claim.

As stated above, the only discernible difference in the present case is that the Union is actuallu named as a party defendant. The present amended complaint contains the same conclusory allegations regarding the Union's breach of duty of fair representation. This Court will not permit plaintiff to circumvent Judge Walinski's order by simply naming the Union as a party defendant.

Since the issue of subject matter jurisdiction of this action was actually litigated and decided between plaintiff and defendant Penn Central in the prior action, plaintiff's argument on the same issue in the present case are barred by the doctrine of collateral estoppel. Dismissal of this case againse Penn Central will fully effectuate the purposes of the doctrine of collateral estoppel, that is, to protect adversaries from the expensive and vexation attending multiple litigation on the same issue; to conserve judical resources, and to foster reliance on judical action by minizing the possibility of inconsistent decisions. Montana v. United States, 440 U.S. 147, 153-54 (1979)

Finally, plaintiff's present lawsuit would, in effect, constitute an impermissible collateral atack on his case which is currently pending before the NRAB. Plaintiff has has opportunity to fully and fairly present his case to the Board with the aid of counsel. Once a claim is submitted to the Board, the Railway Labor Act permits judical review only after the board has rendered its decision. 45 U.S.C. 153 First. Accordingly, palintiff's remedy is to file for review of the decision of the NRAB if he is aggrieved thereby.

The Union's Motionfor Summary Judgment

The Union move to dismiss or, in the alternative, for summary judgment. The Union has submitted various affidavits and other materials in support of its motion. To the extent that the Unio relies on materials outside the pleadings, this Court will consider the Union's alternative motion for summary judgment. This motion has been opposed by plaintiff.

The Union moves for summary judgment on several grounds. First, the Union argues that this Court lacks jurisdiction of this lawsuit. The Union that this is a dispute over the application and interpretation of a collective bargaining agreement. By definition, the Union continues, this is a "minor dispute" within the exclusive jurisdiction of the NRAB. Andrewa v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972). The Union contends that the presence of a claim of a breach of the Union's duty of fair representation should not change this result since the plaintiff was adequately tepresented by able counsel before the NRAB. 45 U.S.C. 153 First(i),(j). The Union concludes that the Andrews case requires the dismissal of both the Carrier and the Union.

As a second ground in support of its motion for summary judgment, the Union argues that the conclusory allegations in the complaint regarding the Union's breach of duty of fair representation are insufficient to state a claim for relief against the Union. The Union urges that plaintiff has failed to state a valid claim because plaintiff has alleged no facts supporting his charges against the Union, citing Gainey v. Brotherhood of Railway and Steamship Clerks, 313 F.

2d 318,323(3rd Cir 1963), and several other case.

Third, the Union claims there was no breach of a duty of fair representation for the reason that the Union was not the bargaining representative for plaintiff's particular unit of employees. The Union notes that plaintiff was a fireman at the time of his discharge. Affidavit of John f. Systma, @8. The Brotherhood of Locomotive Engineermen (the Union or "BLE") was not and is not the bargaining agent for the craft or class of firemen employees on the predecessor railraod (Penn Central) and does not represent those employed as fireman by Conrail. Affidavir of John F. Sytsma, @6-8. Therefore, the Union concludes that it owed no duty to plaintiff to prosecute a grievance on his behalf since plaintiff was not a menber of the bargaining unit of classification of employees from whom the Unio (BLE) had bargaining authority.

Fourth, even assuming arguendo that the Unio did owe a duty to plaintiff, the Union contends that there was no breach of duty of fair representation on the merits of the case fore the reason that plaintiff has no meritorious grievance under the terms and provisions of the collective bargaining agreement. The Union submits affidavits and other materials which show that the applicable collective bargaining agreement in effect between BLF&E and the railroad provided that if an individual failed three times to pass the qualifing examination to become a locomotive engineer he would be discharged from service. Affidavit of A.W. Paulos, Exhibit A, Submission 20, p.3. Plaintiff did not appear for his first and second attempts and failed in his third

attempt. Affidavit of A.W. Paulos, Exhibit A, Submissions 4,5,9,10. Thus, the Union contends it was justified in failing to process plaintiff's grievance since plaintiff discharge was clearly authorized by the terms of the collective bargaining agreement.

Finally, the Union contends that there was no arbitrary or bad faith conduct on the part of the Union in refusing to process plaintiff's grievance. The Union submits affidavits which state that the Union was never requested by plaintiff to take any action on his behalf until applicable time limits under the agreement had expired. Affidavits of John F. Sytsma. The Union concludes that the undisputed material facts before the Court show no breach of their duty of fair representation.

Plaintiff has failed to file affidavits or other materials in opposition to any of these issues raised by the derendant Union. Instesd, plaintiff has filed a two-page memorandum which contains only conclusory denials of the various points raised by the Union.

Rule 56(e), Fed. R. Civ. P. does not permit a party to rest on his pleadings in opposing a motion for summary judgment. Rule 56(e) provides:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

This Court finds that the plaintiff has not met the burden imposed by Rule 56(e) of producing affidavits or other materials to establish a genuine issue of fact regarding any of the defenses raised by the Union.

Under Rule 56(e), it is incumbent upon the plaintiff, no the Court, to demonstrate the existence of and genuine issue of fact. Accordingly, this Court finds that summary judgment in favor of the defendant Union is appropriate.

THEREFORE, for the above stated reasons, good cause appearing, it is

ORDERED that the defendant Consolidated Rail Corporation's motion to dismiss be, and it hereby is, SUSTAINED and that the clerk shall dismiss the complaint as to defendant Consolidated Rail Corporation; and it is

FURTHER ORDERED that the motion of defendant Brotherhood of Locomotive Engineers for summary judgment be, and it hereby is, SUSTAINED and the clerk shall enter judgment accordingly.

IT IS SO ORDERED.

Signed
Sr. United States District Judge

Toledo, Ohio
filed April 17, 1981

APPENDIX D

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

With Referee Robert E. Peterson

Award 23302
Docket 43043

PARTIES (Richard C. Kaiser
TO (
DISPUTE (Penn Central Trans. Co.

STATEMENT OF CLAIM: "Why Richard C. Kaiser is not reinstated with lost wages for being wrongfully terminated and denied complete process of appeal by Penn Central Transportation Co, after following proper Union-Management appeal proceedures?"

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

This is a claim on behalf of a fireman who was terminated after he failed to pass promotional examination to the position of Engineer.

Although it is contraverted as to whether the claim was in fact handled in the usual and timely manner on the property, we do not

find it necessary the Board consider such arguments. We say this for the reason that even if we were to so rule on such a matter, it would still be our finding that the claim must be denied on its merits.

The Claimant admittedly failed to pass the promotional examination after being afforded the opportunity to attend numerous instructional classes. Moreover, reasons advanced by claimant for his failure to take the promotional examination when scheduled, or to have availed himself of instructional classes, is suspect and self-serving. Accordingly, Claimant having failed to comply with the requirements mandated in the controlling agreement realative to promotional examinations, the claim is without merit and will be denied.

AWARD: Claim denied

National Railroad Adjustment
Board by ORDER OF FIRST DIVISION

DATED AT
CHICAGO, ILL
THIS 3rd DAY
of September 1981

Attest: Executive Secretary
NRAB

By: signed
Ass. Executive
Secretary

APPENDIX E

No. 81-3290

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
DEC 16 1982

RICHARD C. KAISER,

Plaintiff-Appellant

V.

ORDER

CONSOLIDATED RAIL CORPORATION f/k/a PENN CENTRAL TRANSPORATION CO.

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Defendants-Appellee.

/

Before: ENGLE and MERRIT, Circuit Judges; and BROWN, Senior Circuit Judge.

No judge in regular active service of the Court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the original appeal. Upon consideration of said petition, the court finding no issue presented which have not previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

clerk

APPENDIX F

Federal Rules of Civil Procedure:

Rule 8(e)(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

Rule 8(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Rule 19(b) If a person described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, of should be dismissed, the absent person being thus reguarded as indispensable.
The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudical to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessend or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Rule 21 Misjoinder and Non-joinder of Parties Misjoinder of parties is not grounds for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Rule 41(b) " . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a proper party under Rule 19, operates as an adjudication upon the merits.

APPENDIX G

RAILWAY LABOR ACT, 45 U.S.C. 151, et seq., Section 3, First (q)

"If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceedings to the division for such furhter action as it may direct. on such review, the findings

and order of the division shall be conclusive on the parties, except that the order of the division may be set aside in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to comform, of confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in Section 1291 and 1254 of Title 28."

No 82-1545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Richard C. Kaiser,

Petitioner,

v.

Consolidated Rail Corporation and
Brotherhood of Locomotive Engineers,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT CONSOLIDATED RAIL CORPORATION IN OPPOSITION

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QUESTION PRESENTED

A dispute arose between a railroad employee and his employer railroad over the interpretation of the applicable collective bargaining agreement. The employee instituted a breach of contract action against the railroad in the United States District Court, which properly was dismissed for lack of subject matter jurisdiction. The employee, with the assistance of counsel, progressed the dispute to the National Railroad Adjustment Board (NRAB) which denied the employee's claim on the merits. While progressing his dispute to the NRAB the employee instituted a second breach of contract action against the employer railroad, which was barred under the doctrines of collateral estoppel and *res judicata* by the earlier decision involving the same parties and issues. The question presented is: whether the Court of Appeals correctly held that the doctrines of collateral estoppel and *res judicata* barred the second breach of contract action against the employer railroad.

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OPINION BELOW

On April 17, 1981, the United States District Court for the Northern District of Ohio, Western Division, issued an Opinion and Order ("the 1981 decision") granting a motion to dismiss of Consolidated Rail Corporation ("Conrail"), f/k/a Penn Central Transportation Company ("Penn Central") and also a motion for summary judgment of the Brotherhood of Locomotive Engineers ("BLE"). The ruling of the trial court on Conrail's motion to dismiss was premised on a finding that lack of subject matter jurisdiction over the same controversy had been determined, as a matter of law, in a prior District Court action filed in 1975 against Penn Central Transportation Company ("the 1975 action"). Copies of the two District Court opinions are appended to the Petition for Writ of Certiorari and are included in the record before the Sixth Circuit Court of Appeals. [1]

The 1981 decision also found that Petitioner's action constituted an impermissible collateral attack on proceedings before the National Railroad Adjustment Board ("NRAB" or "Board"), and that the Petitioner's remedy, if aggrieved by the NRAB decision, was to file a petition for review in the District Court, which he did not do.

Pursuant to Rule 19 of the United States Court of Appeals for the Sixth Circuit, the 1981 decision was

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[1] By letter dated December 27, 1982, counsel for petitioner stated that he would forward to the Supreme Court with the Petition for Certiorari copies of the joint appendix used in the Court of Appeals. Petitioner has failed to file the joint appendix. Accordingly, Conrail will refer to the appendix before the lower court using references "CA App."

affirmed from the bench and a brief Order issued. (Pet. App. A)[2] From this Order, petitioner now seeks certiorari.

QUESTIONS PRESENTED

The only question presented, with respect to Petitioner's cause of action against his former employer, is whether the 1981 decision, as affirmed by the Court of Appeals, was correct in holding that the doctrines of collateral estoppel and *res judicata* foreclosed Petitioner from relitigating his 1975 cause of action for breach of the employment contract.

Petitioner asserts that three questions are raised by the 1981 decision and by the affirmance of that decision by the Court of Appeals. Petitioner's first question, however, misstates the grounds for dismissal by the lower court in the 1981 decision, with the result that petitioner's second question, relating to an alleged conflict among the circuits, is incorrect. There is no conflict among the relevant decisions on *res judicata* and collateral estoppel. Petitioner's brief does not appear to address the third question, concerning the requirements of due process.

STATUTES INVOLVED

The statute involved is the Railway Labor Act, and specifically 45 U.S.C. §153 (i), which is set forth below:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application

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[2] References "Pet. App." are to the Appendix attached to the Petition.

of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

STATEMENT OF THE CASE

Conrail adopts the Statement of the Case set forth by respondent BLE, adding the following facts which are pertinent to the lower court's application of the doctrine of collateral estoppel.

The first of two court proceedings instituted by the petitioner was an action filed against the Penn Central on December 5, 1975 (the 1975 action) in the United States District Court for the Northern District of Ohio, No. 75-480 (CA App. 16-18). Petitioner alleged a cause of action for breach of the employment contract, seeking both damages and reinstatement. Subsequently, in the same action petitioner amended his complaint (CA App. 24) to include an allegation of breach of the Union's duty of fair representation, although Petitioner did not name the BLE as a party defendant. The District Court granted Penn Central's motion to dismiss the complaint for lack of subject matter jurisdiction, and issued an Opinion and Order of August 5, 1976 (the 1976 decision), finding that Petitioner's cause of action involved a "minor dispute" over the interpretation of the terms of the

collective bargaining agreement and that the NRAB had exclusive jurisdiction to resolve the dispute. In reaching this conclusion the District Court specifically considered the doctrine of *Glover v. St. Louis - San Francisco Railway*, 393 U.S. 324 (1969) and found it inapplicable.[3] (CA App. 22). The trial court's dismissal of Petitioner's cause of action was *not* predicated on failure to join an indispensable party, but rather on lack of subject matter jurisdiction. (CA App. 20). The 1976 decision never was appealed.

Thereafter, Petitioner filed a claim for wrongful termination with the NRAB, which claim was processed fully and investigated. However, prior to receiving a decision from the Board, Petitioner, on December 5, 1979, filed a second action (the 1979 action) in the United States District Court for the Northern District of Ohio, reasserting a claim for breach of contract against Penn Central, through its statutory agent Conrail, and against the BLE for breach of its duty of fair representation. The only difference between the 1975 action and the 1979 action (of which the present petition is an outgrowth) was Petitioner's formal designation of the BLE as a party defendant in the second action.

Conrail filed a motion to dismiss petitioner's 1979 action on the ground that, under the doctrines of *res judicata* and collateral estoppel, his claim for breach of the employment contract was barred by the 1976

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[3] In the 1976 decision the court notes that "Plaintiff nevertheless contends that there is an exception to this rule when there is an allegation that the union has breached its duty of fair representation to the employee. For this proposition he cites, *inter alia*, *Glover v. St. Louis-San Fran. Ry.*, 393 U.S. 324 (1969)."

decision. In the 1981 decision the district court granted Conrail's motion, applying the doctrine of collateral estoppel to two issues: (1) whether the cause of action constituted a "minor dispute" within the meaning of the Railway Labor Act so as to limit petitioner's remedy to a proceeding before the NRAB; and (2) whether, if the dispute was "minor," the *Glover* doctrine nevertheless protected petitioner's access to the district court. Finding that the cause of action was the same as that advanced in the 1975 action the lower court held that both issues previously had been resolved against the petitioner and that dismissal of the suit against Penn Central would "fully effectuate the purposes of the doctrine of collateral estoppel." (CA App. 8). Nothing in the 1981 decision or the order of the Court of Appeals supports petitioner's present assertion that the lower court's decision was based on petitioner's failure to join an indispensable party.

ARGUMENT

REASONS FOR DENYING THE WRIT

This case involves no questions of law that are novel or worthy of review.

The first and second questions of the three posed by the petitioner mischaracterize both the 1976 and 1981 decisions and, therefore, miss the point that the 1981 decision was predicated solely on *res judicata* and collateral estoppel. No conflict exists among the circuits on these doctrines as applied to this controversy. Petitioner's third question regarding due process in the context of a "minor dispute" involving discharge from employment because of failure to pass a promotional exam has been resolved by this Court in favor of adherence to the exclusive administrative grievance

procedure mandated by the Railway Labor Act. *Union Pacific Railroad v. Sheehan*, 439 U.S. 89 (1978); *Andrews v. Louisville & Nashville Railroad*, 406 U.S. 320 (1972).

Because the Petition raises no novel federal question, is consistent with prior decisions of this Court and involves no issue of dispute among the circuits, it should be denied.

I. The Facts Established by the Record Below Clearly Demonstrate that Petitioner's Cause of Action, Involving a "Minor Dispute" for Which Exclusive Jurisdiction Lay in the National Railroad Adjustment Board, was Barred, under the Doctrines of Collateral Estoppel and Res Judicata, by an Earlier Decision Involving the Same Parties and Issues.

In the District Court and the Court of Appeals Conrail, as Penn Central's statutory agent, raised the defenses of *res judicata* and collateral estoppel. The Opinion and Order of the trial court limited its discussion to the doctrine of collateral estoppel; but because the findings and ultimate decision to dismiss Conrail as a party were based on a determination that Petitioner's cause of action was barred by the 1976 decision, Conrail believes that a brief discussion of *res judicata* is also necessary for a complete review of the propriety of the District Court's dismissal.

The doctrine of *res judicata* bars a second suit when a judgment on the merits has been rendered in a prior action involving the same cause of action and the same parties or their privies. *Costello v. United States*, 365 U.S. 265 (1961); *Cromwell v. County of Sac*, 94 U.S. 351 (1876); *Weston Funding Corp. v. Lafayette Towers, Inc.*, 550 F.2d 710 (2d Cir. 1977);

All States Investors, Inc. v. Sedley, 399 F.2d 769 (6th Cir. 1968); *Acree v. Air Line Pilots Association*, 390 F.2d 199 (5th Cir. 1968), *cert. denied*, 393 U.S. 852 (1968); *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967). This Court has held that the principles of *res judicata* apply to questions of jurisdiction as well as to decisions on the merits. *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932). *See also Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522 (1931). When the prior judgment is not on the merits, the *res judicata* bar is conclusive only as to the issues that actually were adjudged. *See Acree v. Air Line Pilots Association, supra*, 390 F.2d at 203.

The 1981 decision clearly and unequivocally sets forth each requisite finding for application of the doctrine of *res judicata*. In both the 1975 and 1979 actions, petitioner stated the same cause of action (breach of the collective bargaining agreement) based on the same allegations. In both actions the party asserting the defense was the same, namely Conrail. [4] In both actions the same right (Petitioner's right not to be wrongfully discharged) was allegedly infringed by the same wrong (Petitioner's termination for failure to pass the promotional exam). Not only would the same evidence sustain both judgments, but the lack of subject matter jurisdiction would again be conclusive in the second action. It readily may be

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[4] The addition of the Brotherhood of Locomotive Engineers as defendant to the 1979 action does not upset the balance, as the union is not implicated in Count I of the Complaint and the Penn Central is not implicated in Count II. The prior judgment is to be applied only to Count I of the complaint, Petitioner's claim of breach of contract by the Penn Central.

inferred, from the brief discussion in the 1981 decision of the NRAB's exclusive jurisdiction over "minor disputes," that had it been necessary, the Court would have reached the same conclusion as did the trial court in Petitioner's prior action. (CA App. 8). The only conclusion, however, which could be, and was, reached by the trial court below was that the two separate lawsuits were identical and that the unappealed 1976 decision was determinative on the issue of subject matter jurisdiction, thereby rendering dismissal in the present action mandatory.

Even if the trial court had found a new cause of action to be stated against Penn Central in the second complaint, application of the doctrine of collateral estoppel to the prior court's finding that subject matter jurisdiction was lacking would lead to the same result, dismissal of the complaint as to Conrail. "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the primary litigation." *Montana v. United States*, 440 U.S. 147 (1979). *See Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967). In the 1975 action, the trial court found Petitioner's claim to be one against his former employer over differing interpretations of the collective bargaining agreement. The Court in that proceeding was ". . . satisfied that the dispute involved herein is a 'minor' dispute within the exclusive jurisdiction of the Railroad Adjustment Board, and that the defendant's [respondent's] motion should be granted." (CA App.20). The same complaint, supported by the same allegations and involving the same

legal issues and the same parties, is involved in the action now pending before this Court. Accordingly, Petitioner is foreclosed from relitigating the jurisdictional issue in this action.

Furthermore, no change in the controlling facts or legal principles occurred between the two suits which would have created an exception to the doctrines of *res judicata* and collateral estoppel. *Montana v. United States*, 440 U.S. at 155. During the interim period Petitioner processed his claim through the grievance procedure provided under the collective bargaining agreement and received, with the assistance of counsel, a full hearing before the NRAB. At the time he filed his second cause of action the Board had not yet issued its opinion on the merits. Subsequently, after issuance of the 1981 decision and after Petitioner had filed his appeal with the Sixth Circuit, the NRAB released its decision denying Petitioner's claim on the merits. (CA App. 68).

Petitioner, dissatisfied with the NRAB decision on the merits and the 1981 decision, seeks to avoid the doctrine of collateral estoppel by arguing that it is a judicial doctrine "modernized to achieve substantial justice," and by averring that "[i]n the instant case substantial justice is not being served." (Petition, pp. 11-12). This constitutes the second attempt by the Petitioner to challenge his dismissal. Petitioner has had not only the opportunity to raise the same issues in a prior judicial action and to appeal the judgment in that action (which he did not do) but also the opportunity to pursue his claim with the assistance of counsel through the grievance procedure provided by the collective bargaining agreement pursuant to the Railway Labor Act. The decision of the NRAB is final

and binding, absent an appeal to the District Court on very narrow grounds, *Union Pacific Railroad v. Sheehan*, 439 U.S. 89, 93 (1978), an appeal which was not prosecuted. Thus, more than substantial justice has been done Petitioner, and his conclusory argument to the contrary must fail. The case at bar epitomizes the policy and purposes of *res judicata* and collateral estoppel.

> As this Court and other courts have often recognized, *res judicata* and collateral estoppel relieve parties of the cost of vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.

Montana v. United States, 440 U.S. 147, 153-154 (1979). Accordingly, the trial court properly found that Petitioner was barred from relitigating his claim for breach of contract against Conrail, as statutory agent for Penn Central, in the action now pending before this Court.

II. There Is No Conflict Between the Opinion and Order of the Trial Court Below, the Decisions of This Court and the Decisions of Other Circuits.

Petitioner purports to find a conflict among the circuits. However, in view of the facts that (1) the trial court in the 1975 action specifically addressed the *Glover* doctrine, (2) no appeal was taken from the 1976 decision, and (3) the 1981 decision was based on *res judicata*, the dispute among the circuits to which Petitioner calls attention as to the applicability of the *Glover* doctrine is not germane to resolution of the issues at bar. As noted by this Court in *Allen v. McCurry*, this Court has long recognized and applied the doctrines of collateral estoppel and *res judicata* when the causes of action, the supporting allegations,

the legal issues and the parties are identical. *Montana v. United States*, 440 U.S. at 147; *Costello v. United States*, 365 U.S. 265 (1961); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955); *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876). The only issue arising from the trial court's dismissal of petitioner's cause of action against Conrail is whether the doctrine of collateral estoppel and/or *res judicata* was properly applied, and on this issue there is no conflict.

CONCLUSION

The Petition for Writ of Certiorari should be denied because petitioner argues issues which do not arise from the trial court's Opinion and Order below, because no substantial issue is raised, and because there is no conflict among the Circuits over application of the doctrine of collateral estoppel, which is the sole issue necessary to resolve Petitioner's claim against respondent Conrail, as statutory agent for Penn Central.

Respectfully submitted,

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No. 82-1545

In the Supreme Court of the United States

October Term, 1982

RICHARD C. KAISER,
Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS IN OPPOSITION

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QUESTION PRESENTED

A dispute arose between a railroad employee and his employing railroad over the interpretation and application of the collective bargaining agreement. The dispute was progressed by the employee, through his counsel, to the National Railroad Adjustment Board (NRAB). The Board, by a decision of a neutral referee, denied the employee's claim on its merits. The question presented is: whether the Court of Appeals correctly held that the decision of the NRAB is conclusive on the employee, the union to which he belonged and the employing carrier and that the only review of that decision is set forth in Section 3, First (q) of the Railway Labor Act.

PARTIES INVOLVED

Respondent Brotherhood of Locomotive Engineers (BLE) is the collective bargaining representative for the craft of locomotive engineers employed by respondent Consolidated Rail Corporation (Conrail). Petitioner was employed by Conrail as a locomotive fireman and was a member of BLE.

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No. 82-1545

In the Supreme Court of the United States

October Term, 1982

RICHARD C. KAISER,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS IN OPPOSITION

STATEMENT

Petitioner was hired by the New York Central Railroad in 1967. He worked as a fireman for six and one-half years for the New York Central and its successor, Penn Central Transportation Company. During the year 1973, he attempted to pass the qualifying examination to become a locomotive engineer. This attempt to qualify was pursuant to a contractual rule in effect between the railroad and

the Brotherhood of Locomotive Firemen & Enginemen (BLF&E), now the United Transportation Union (UTU). Said rule (CA App. 66)[1] provided, inter alia, that should an individual fail to pass the qualifying examination three times, he would be discharged from service. Petitioner failed to report for the first examination held on September 4, 1973, and said failure was reported to petitioner by certified letter dated September 26 (CA App. 47). He failed to take the second examination on October 31, 1973 and acknowledged said failure the same date by signing a receipt of the notice. This notice also advised petitioner that the third and final examination would be held on December 5, 1973 (CA App. 48). Petitioner took the examination on December 5, 1973 and failed said examination. Again, he acknowledged said failure on the same date by signing a receipt of the notice (CA App. 52). On December 5, 1973, petitioner was removed from service by letter from the railroad, receipt of which was acknowledged by him on the same date (CA App. 53).

At all times relevant hereto, petitioner was employed in the craft of locomotive firemen and his rules, wages and working conditions were governed by the collective bargaining agreements in effect between the railroad and the BLF&E or the UTU (CA App. 35). At no time during petitioner's railroad employment did the BLE represent employees working as locomotive firemen on said railroads, and its agreements do not cover employees in that craft (CA App. 34-35). In addition, BLE had nothing to do with

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1. References "CA App." are to the appendix before the Court of Appeals for the Sixth Circuit. By letter dated December 27, 1982, counsel for petitioner stated that he would forward to the Supreme Court with the Petition for Certiorari copies of the joint appendix used in the Court of Appeals. He failed to file a joint appendix; therefore, respondent BLE shall refer to the appendix before the lower court.

the hiring, employment, initial assignments, administration of examinations or qualification or disqualification of locomotive firemen on railroads employing petitioner (CA App. 35). The BLE is the duly designated collective bargaining representative for the craft or class of locomotive engineer employees, and for that craft only, on respondent Conrail and its predecessor railroads.

Following his dismissal from railroad service, BLE had no further contact with petitioner for a period of two or three years. It was during this period, unbeknown to BLE, that petitioner commenced an action against Penn Central for breach of contract in the United States District Court, Northern District of Ohio, Western Division, Case No. C75-480 (CA App. 16-18). Said Complaint was dismissed on August 5, 1976 (Pet. App. 23-26).[2]

BLE had no knowledge of any request by petitioner to process any claim or grievance in his behalf within the contractual time limits, and petitioner never communicated with any officer of the BLE. Other than the fact that petitioner was a BLE member[3] until February, 1974, BLE had never heard of petitioner or his claim or grievance against Conrail until served with a copy of his complaint in this case filed on December 5, 1979 (CA App. 34).

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2. References "Pet. App." are to the Appendix attached to the Petition.

3. On page 5 of the Petition, petitioner states that a "closed shop" required him to join the BLE. This is an erroneous statement as Section 2, Eleventh (c) of the Railway Labor Act, 45 U.S.C. §2, Eleventh (c) provides that an operating employee satisfies the union shop requirement if he belongs to any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services. Petitioner could have joined the BLF&E and subsequently the UTU as craft representative.

In September 1976, petitioner and/or his attorney made their first attempts to process a claim or grievance to the NRAB. On May 29, 1977, petitioner filed his submission or claim with the NRAB, First Division. Penn Central, now Conrail, filed its answer to the submission on September 16, 1977. On November 30, 1977, the dispute was docketed by the NRAB as R 43 043. An oral hearing was held on January 25, 1978, at which both petitioner and his attorney appeared before said Board (CA App. 37). Section 3, First (j) of the Railway Labor Act, 45 U.S.C. §153, First (j), provides:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

While the NRAB case was awaiting decision, petitioner, on December 5, 1979, filed a second lawsuit in the United States District Court, Northern District of Ohio, Western Division, Case No. C79-712, naming Conrail and BLE as defendants (CA App. 2). The complaint made conclusory allegations that BLE had breached its duty of fair representation. BLE filed a motion to dismiss or, in the alternative, for summary judgment with supporting affidavits (CA App. 32-35, 36-67). Petitioner failed to file affidavits or other materials in opposition to the issues raised by the BLE (Pet. App. 33), and the District Court granted the motion for summary judgment (Pet. App. 34).

Petitioner filed a notice of appeal on May 12, 1981 (CA App. 26). On September 3, 1981, during the pendency of his appeal before the Court of Appeals for the Sixth

Circuit, the NRAB rendered its decision on petitioner's claim (Pet. App. 35). In denying said claim, the Neutral Referee,[4] Robert E. Peterson, stated:

> "The Claimant admittedly failed to pass the promotional examination after being afforded the opportunity to attend numerous instructional classes. Moreover, reasons advanced by Claimant for his failure to take the promotional examination when scheduled, or to have availed himself of instructional classes, is suspect and self-serving. Accordingly, Claimant having failed to comply with the requirements mandated in the controlling agreement relative to promotional examinations, the claim is without merit and will be denied."

The Court of Appeals summarily affirmed the judgment of the District Court (Pet. App. 22). Attached hereto as an appendix to this response is a transcript of the proceedings before that Court.[5] Petitioner's petition for rehearing en banc was denied on December 16, 1982 (Pet. App. 37).

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4. Section 3, First (l) of the Railway Labor Act, 45 U.S.C. §153, First (l) provides that a neutral person will be appointed when members of labor organizations and the carriers cannot make a decision and deadlock. Here, members of labor voted to sustain the claim and members of the carriers voted to deny the claim. As a result, Mr. Peterson was chosen as the neutral to decide the case.

5. The transcript was prepared from a tape of the proceedings taken by the Clerk of the Court of Appeals. Because of background noise, etc., the tape is not perfectly clear, yet it was transcribed by an individual who swore to its accuracy to the best of her ability. Said appendix is designated at p. A1.

REASONS FOR DENYING THE WRIT

This case involves no question of law that is novel or worthy of review. The decision on the merits of the NRAB of a dispute between an employee and his carrier over the interpretation of a collective bargaining agreement is conclusive on the parties, and petitioner's only avenue for review is pursuant to Section 3, First (q) of the Railway Labor Act, 45 U.S.C. §153, First (q). The petitioner cannot show a meritorious claim in view of the decision by the NRAB; therefore, BLE could not have breached its duty of fair representation. Furthermore, the established facts in this case clearly show that the conduct of BLE was not hostile, discriminatory, or in bad faith.

Contrary to petitioner's assertions, the decision below is not a departure from the decisions of this Court in *Glover v. St. Louis-San Francisco R. Co.*, 393 U.S. 324 (1969) and *Vaca v. Sipes*, 386 U.S. 171 (1967) but consistent therewith. There is no conflict between the Circuits, and the decision below presents no question under the Railway Labor Act which merits this Court's review. The decision is consistent with the holdings of this Court and its reading of the Railway Labor Act.

I.

THE DECISION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD IS CONCLUSIVE ON THE PARTIES

On September 3, 1981, the NRAB, First Division, denied petitioner's claim on its merits (Pet. App. 35). It is well established that awards of the NRAB are to be final and binding. *Union Pacific R.R. v. Price*, 360 U.S. 601

(1959). Section 3, First (q) of the Railway Labor Act, 45 U.S.C. §153, First (q) provides for and defines the narrow extent of the only review available for NRAB awards (Pet. App. 39).

This Court in *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), in terms dispositive of this case, said:

> "A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. Union Pacific R. Co. v. Price, 360 U.S. 601, 3 L Ed 2d 1460, 79 S Ct. 1351 (1959). He is limited to the judicial review of the Board's proceedings that the Act itself provides. Gunther v. San Diego & A. E. R. Co., 382 U.S. 257, 15 L Ed 2d 308, 86 S Ct. 368 (1965)." *Id.* at 325.

This Court in *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1979) once again emphasized the importance of keeping "minor disputes" out of the courts, stressed that any review of a board award must be pursuant to Section 3, First (q) and that the allegedly aggrieved party must meet the statutory grounds prescribed by the statute, the *Sheehan* Court said:

> ". . . the dispositive question is whether the party's objections to the Adjustment Board's decision fall within any of the three limited categories of review provided for in the Railway Labor Act. Section 153 First (q) unequivocally states that the 'findings and order of the (Adjustment Board) shall be conclusive on the parties' and may be set aside only for the three reasons specified therein. We have time and again emphasized that this statutory language means just what it says. See, e.g., Gunther v. San Diego & A. E. R. Co., 382 U.S. 257, 263, (1965); Locomotive En-

gineers v. Louisville & Nashville R. Co., 373 U.S., *supra*, at 38; Union Pacific R. Co. v. Price, 360 U.S. 601, 616, (1959)." *Id.* at 93-94.

This Court went on to say that a contrary conclusion would ignore the terms, purposes and legislative history of the Railway Labor Act.

In view of the plain reading of Section 3, First (q), petitioner herein must file a petition to review the NRAB decision in the appropriate United States District Court alleging the factual basis for the limited review discussed in the *Sheehan* case. To permit otherwise, would be in contravention of the minor disputes procedures of the Railway Labor Act, the finality of NRAB decisions and the legislative history and case law developed by this Court.

II.

THE ESTABLISHED FACTS IN THIS CASE SHOW THAT BLE DID NOT BREACH ITS DUTY OF FAIR REPRESENTATION

As stated by the District Court and affirmed by the Court of Appeals, petitioner failed to file affidavits or other materials in opposition to the issues raised by the BLE; therefore, petitioner did not meet the burden imposed by Rule 56(b) of the Federal Rules of Civil Procedure. Although this is not an issue that needs to be addressed by this Court, a short discussion of the duty of fair representation clarifies BLE's position in this case.

It is well recognized that the purpose of summary judgment is to determine whether there is any genuine issue of material fact in dispute, and if not, to render judgment in accordance with the law as applied to the established facts. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144

(1970). The courts below concluded that BLE did not violate the fair representation duty as that duty has been defined and applied by this Court.

This Court has said that to establish a breach of the duty of fair representation, petitioner is required to show a meritorious contractual claim. In *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court said that a union "may not arbitrarily ignore a *meritorious* grievance or process it in a perfunctory fashion." (Emphasis added). *Id.* at 192. This Court stated the complainant does not establish a breach of the duty of fair representation by merely showing that he was wrongfully discharged. The Court stressed, "he must *also* have proved arbitrary or bad faith conduct on the part of the union in processing his grievance." (Emphasis added). *Ibid.* More recently, in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570 (1976); this Court again held:

> "To prevail against *either* the company or the union, petitioners (the employees) must show not only that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty of fair representation by the union." (Emphasis supplied).

The decision of the NRAB on the merits conclusively determines that petitioner's discharge was in accordance with the collective bargaining agreement; therefore, petitioner cannot meet the first test to establish a breach of the duty of fair representation, a meritorious claim. Summary judgment was properly granted.

Similarly, petitioner cannot establish arbitrary or bad faith conduct on the part of BLE. This Court in *Vaca v. Sipes, supra,* defined what constitutes a breach of the duty of fair representation:

> "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190.

This Court has also said that to establish a breach of the duty of fair representation, complainant must show substantial evidence of fraud, deceitful action or dishonest conduct on the part of the union. *Humphrey v. Moore,* 375 U.S. 335 (1964); *Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1971). The uncontroverted facts in the instant case establish that the conduct of the BLE does not fit within the categories of conduct discussed by this Court. Therefore, petitioner is also unable to meet the second test necessary to establish a breach of the duty of fair representation.

III.

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW, THE DECISIONS OF THIS COURT AND THE DECISIONS OF OTHER CIRCUITS

Petitioner contends that the decision below conflicts with the decisions of this Court in *Glover v. St. Louis-San Francisco R. Co.,* 393 U.S. 324 (1969) and *Vaca v. Sipes,* 386 U.S. 171 (1967). BLE has already discussed the applicability of *Vaca* to the instant case. *Glover* is easily distinguished from the case at bar. In *Glover,* suit was brought by a group of union employees, both black and white, against their employer and union alleging racial discrimination and their futility in attempting to convince their union to pursue contractual and administrative remedies. Plaintiffs sought damages and injunctive relief. The Court said that plaintiffs need not exhaust their administrative remedies stating:

> "Moreover, although the employer is made a party to insure complete and meaningful relief, it still remains true that in essence the 'dispute' is one between some employees on the one hand and the union and management together on the other, not one 'between an employee or group of employees and a carrier or carriers.' Finally, the Railroad Adjustment Board has no power to order the kind of relief necessary even with respect to the railroad alone, in order to end entirely abuses of the sort alleged here." 393 U.S. at 329.

In the case at bar, the petitioner was permitted, and in fact, completed the arbitration process. The dispute was one between an individual on one hand and management on the other. This is obvious from the fact the members of the First Division of the NRAB deadlocked and a neutral referee had to be chosen to decide the dispute. Finally the NRAB had the power to provide petitioner with complete relief, reinstatement and back pay. The instant case has none of the factual distinctions present in *Glover* and is governed by the rationale in *Andrews, supra*, and *Sheehan, supra.*

Petitioner also contends there is a conflict between the decision below and decisions of other circuits. The case of *Schum v. South Buffalo Railway Co.*, 496 F.2d 328 (2nd Cir. 1974) involved a situation where the complainant was not permitted to take his case to arbitration because the union defaulted on the time limits. In the instant case, petitioner, through counsel, took his case to arbitration in accordance with Section 3, First (j) of the Railway Labor Act, 45 U.S.C. §153, First (j) and lost the case on its merits. *Otero v. Int'l Union of Electrical Workers*, 474 F.2d 3 (9th Cir. 1973) was not a case under the Railway Labor Act and merely holds that the arbitration procedure contained

in the collective bargaining agreement must be followed. A similar conclusion was reached in the case of *Dorsey v. Chesapeake & Ohio Ry.*, 476 F.2d 243 (4th Cir. 1974).

The lower court recognized the exception in *Glover* (Pet. App. 29) and properly found that the factual bases for the exception in that case did not apply to the instant case. There is no conflict between this case and *Glover*, and the decisions of the various circuit courts cited by petitioner, rather than being in conflict, support the decisions of the lower courts.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX

The following is a transcript of the October 6, 1982 oral argument before the United States Court of Appeals for the Sixth Circuit in *Kaiser v. Consolidated Rail Corp. et al.*, No. 81-3290 (6th Cir. Oct. 21, 1982). This transcript was prepared from the cassette tape recording furnished by the Clerk of the United States Court of Appeals for the Sixth Circuit.

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[Not understandable prior to this point]

Counsel: Good morning Your Honor. I would like to receive four minutes . . . .

Judge: Four, we better hold you on this one. The time . . . is not quite as complex.

Counsel: I am here today on behalf of Plaintiff-Appellant asking this Court to remand this case to the District Court for a hearing to be heard and decided by a jury is requested of an impartial and disinterested people. Plaintiff, Richard Kaiser, a fireman for 6½ years with the Penn Central Railroad Company was injured during his employment. Wanting compensation for his injuries and the carrier not granting it, he took that case to District Court. He was successful. He was told by some of the employees of the carrier that he was going to be terminated for his carrying that case out.

Judge: Counsel, let me ask you about . . . since we don't have too long here, we are going to have to get along, about your exhaustion problems. As I understand the facts there, they are that while the case was pending before the administrative agency your client filed suit in the Federal District Court. It was dismissed for ex-

haustion of remedies and there was never any appeal or review taken from the action of the administrative agency. This is a case that comes directly from the District Court. Now why, when they set up a procedure to go to an administrative agency to get this matter adjusted down at the Railroad Adjustment Board, and they set up an appellate procedure from the action of the administrative agency to the Federal District Court, why is not that the exclusive method for adjudicating this question and why are you permitted; why should we permit you to go directly to the District Court on the issue without following the procedure for administrative reviews set up in the statute?

Counsel: Your Honor, in answer to your question clearly the Railway Labor Act took the jurisdiction for minor disputes involving complaints or disagreements between a contract between an employee and an employer.

Judge: Well that's what you've got here. Termination, right?

Counsel: However, the long list of cases like *Glover* and *Vaca*, and so on had said that the National Railway Adjustment Board is comprised of members of both the carrier and the union. They are not disinterested parties. It's not fair and impartial determination . . . . As in this case, Plaintiff maintains that he was wronged by both of these people. That it's not fair under fundamental principles of justice to allow the same people he's claimed didn't treat him fair in the first place to then be allowed to decide the case in the second place.

Judge: Were you claiming something that the Board did was unfair?

Counsel: No. I am assuming that's why it came up at the *Glover* and that cases that allow jurisdiction in the

District Court where you have, as in this case, a breach of duty of contract and a breach of duty of fair representation. Assuming and as it says within those cases and a lot of cases that it is not fair to involve the same people who are claiming for unfair views to now decide the case.

Judge: Well, the statute allows it and that's final isn't it, except for three small, three limited—the petition is very very limited.

Counsel: Counsel agrees with Judge that the exceptions are three very small things.

Judge: That's right. The jurisdiction and the fraud and one other element. So really you simply can't mess with what Congress has allowed you to complain about in-so-far as the decision of the Board is concerned. But now you claim that under *Vaca v. Sipes* as I understand the complaint, that your ability to represent yourself and for the plaintiff to represent himself before the Board, his right to be represented by the union before the Board? Is it under *Sipes* that would be his right would have been lost and it would be actionable for unfair representation if they didn't present his claim fairly?

Counsel: In this case they never processed his grievance at all.

Judge: Who?

Counsel: The Union.

Judge: So you're not claiming that the Board itself wouldn't be able to entertain it until they got a grievance, so you can't complain about the Board.

Counsel: No, I am not complaining about the Board.

Judge: But you are complaining that the union should have processed his grievance or they had the obligation

of fair, good representation to present it unless they believed it was not meritorious.

Counsel: Right, and in this case they didn't process it at all. Under the belief that it wasn't meritorious, they just did not process it at all and it was never processed later under a leniency basis only. His union did process his grievance well after the time ran out and they determined that it was not a meritorious grievance.

Judge: I guess my problem that I saw was, this goes back to *Vaca v. Sipes,* it opens up . . ., when you can open up a grievance procedure because the employee did not have a good representation, then they say that equity says that it makes the employer the necessary party to that for relief even though the failure is all the part of the unions. But here they seem to have provided for an exclusive remedy with very limited appeal, and I am just wondering if *Vaca v. Sipes* really does apply here.

Another way of asking that same question which also bothers me is that *Vaca v. Sipes* is just an unfair representation situation. You know, like Judge . . . is saying where you allege the employer has done something wrong and that the union didn't fairly represent you. But *Glover,* the exception in *Glover* is not a *Vaca v. Sipes* exception. That was a case where the union and employer were acting in concert, together, to do something. It wasn't an unfair representation where the employer does something wrong and the Union just doesn't file a grievance or doesn't fairly represent somebody. So, I don't see that that exception applies. Why should that—if we applied the *Glover* exception to the *Vaca v. Sipes* situation, it would eat up the whole rule. That's the point, do you follow me?

Counsel: Yes, we do your honor.

Judge: Well, the trial judge found that this was a—what do they call it—a minor grievance, Counsel says "minor dispute", minor dispute so that puts it in the hands of the processing of what you've got. Finally, as I understand it when the claim went, they had it before a referee and the referee stated that facts lead to that you failed to comply with the facts mandated in the controlling agreement relevant to promotional examination of the plaintiffs without merit is denied. Was there any appeal from that?

Counsel: Are you talking about the first case of the District Court your honor?

Judge: Yes.

Counsel: No, your honor. There was not an appeal to that for two reasons. First, the judge—Judge . . . was correct in saying that incidentally minor disputes that is within the exclusive jurisdiction of the National Railway Adjustment Board. . . ., we went on to file the second cause of action which cured that subject matter jurisdictional defect in that we alleged breach of duty of fair representation in that the union and the carrier were acting together to deprive him of his right to a fair and impartial hearing. The Court, and I am looking at it right here, made what I would say an incorrect statement "determination that this dispute involved herein is minor, leaves this Court without jurisdiction." I am saying that those cases *Vaca* and *Glover* say that's not true. It can be a minor dispute, but the District Court does not have jurisdiction when you allege that it is a problem against both the carrier and the union, not a dispute between the employee and the carrier; or a dispute between an employee and the union. When you allege both, that's what all those cases cite. I am citing *Vaca* and *Glover* and more talking towards the cases and the line of thinking of the judges in those cases than the act of holding of

that case. It is within those cases where they expound upon the fundamental principles that Congress in taking away . . . jurisdiction in these matters and giving it to arbitration, and giving it to the National Railway Adjustment Board, didn't have in mind that when you are alleging that both of those people, who are acting in bad faith that you now have to go against those people. You could go to the District Court to get a fair and impartial determination of your claim. I think that's the real holding of the fundamental principles of justice that they expounded in any of the cases that have allowed an employee to go to District Court and not go to the National Railway Adjustment Board. We went to the National Railway Adjustment Board first thinking that we had to exhaust our administrative remedies, and we went and filed again in District Court after reading enough cases and realizing we didn't have to do that. We never really wanted the case before the National Railway Adjustment Board and we were not surprised that the National Railway Adjustment Board after one being deadlocked to decide against it. That was not a surprise. I assume that the very people that we're complaining of unfair handling without impartiality also found against it, the line of reasoning which gives us the right to go to District Court. And that Court is speaking basically to our claim against the carrier. I think that in the second case the union was dismissed under summary judgment under Rule 56, and I think Judge Young in plaintiff did not present an affidavit or any other evidence to establish that there was a genuine issue of material facts in dispute, in that case, our pleading in our second case was considerably different than the pleading in the first case. In the second case the District Court is not the same as second case. The underlying principles of facts are the same party, the same time and the same fireman, but there is alleging a lot of those things in there, namely that the grievances

given to the union in care of the carrier is . . . different. We are alleging that there is an action between those parties in an overt attempt to deny him his process and that is why he was fired. We submitted an affidavit form which we allege contradictions to everything alleged in their motion for summary judgment in their affidavits. The judge said that we did not under Rule 56 give a summary judgment. In other words we got a partial determination of our case by a judge without being given the opportunity to present all the facts. I think Rule 56 and the cases under it say that they must be viewed, the affidavits must be viewed in the light most favorable to the party opposing the motion. He says in his opinion that we did not file any affidavits or raise any questions of material issues with immaterial facts. I think if you read our complaint, it notes that it is in affidavit form and read *Duke's* [?] decision, I don't really see how he came up with that conclusion. It is clear that we didn't raise as nearly many issues on which Reed and White [?] differ on.

Judge: 45 153(q) makes it a little difficult for us to take jurisdiction of it. Doesn't it? The Board's findings are being remanded and set aside only for failure of the Board to comply with the requirements of the Act, for failure in the Order to conform or confine itself for matters that only spoke of divisions jurisdiction or for fraud or corruption by a member of the division making the order.

Counsel: That's correct your honor. We are not asking for review of the National Railway Adjustment Board's decision. That's not what we are here for today. We are just asking to be allowed to present our case to District Court before a fair and impartial jury as we requested, and we only went to the National Railway Adjustment Board thinking that we would exhaust our ad-

ministrative remedies and after a little more careful study, we realized we didn't have to. And at the time of the first lawsuit the union was under leniency bases processing the grievance long after the time had expired for presenting it. They finally found that since it wasn't presented within the time period used to . . . the question which needs to be determined by an impartial people did he file a grievance within the sixty days? We say of course we did file the day, the very day he was terminated. They say we didn't file for some two years later. That's the genuine issue to be determined by a prior . . . . After full presentation of all the evidence, that is the evidence to support it. The issue of res judicata and collateral estoppel is the reason all the cases I've heard and I assume that's why this case got here today. The Appellee will argue that collateral estoppel or res judicata is determinative of subject matter's jurisdiction from the onset in this case. That we say—no it is not. There was never a hearing on the merits. Initially we agreed with the judge that this was a minor dispute because we didn't allege in our first case, and I had cited in my reply that the jurisdictional dismissals do not bar or prove litigation of a cause of action when a subsequent complaint cures the jurisdictional defect. I cite some cases on that. Appellee will have this Court believe that that determination as a minor dispute is the final judgment and thus res judicata for collateral estoppel bars second free . . ., we deny that.

Judge: Ok, you have used your time.

Counsel: Thank you.

Judge: Mr. Williams, we thank you for your argument and I notice it's your first appearance before us. Our Court has a rule, Rule 19, which allows the disposition be made from the bench when the Court is satisfied

after hearing an oral argument that it is unanimously agreed upon the result and satisfied that no jurisdictional purpose would be served by further written opinion. That doesn't mean that your appearances here and the other party's appearance was in vain because we do this, we have to decide a number a cases without oral argument. But there's a certain other group where we think we are quite certain about the result, but we want to hear the oral argument because once in a while something comes up to tell us we were wrong; so we were listening with particular care to Mr. William's argument. However, we are convinced unanimously of the opinion that there was no error which was committed in the lower court which would occasion our reversal though we may not necessarily agree with all the reasons that Judge Merritt has basically set forth, the view that this was a matter for which was grieved under the Railway Adjustment Board; it was a minor grievance under the Act; and, that is agreed and that provides exclusive remedy with only three exceptions which may be the subject, not of appeal to this Court but of a petition for review directly rather than through the District Court. The counsel has agreed that those grounds do not exist. Under those circumstances we do not believe that *Vaca v. Sipes* or the other cases cited by the Appellant were such as to indicate any Congressional intention that District Court could collaterally intervene with and block the, or reach a, contrary decision of that which was reached by the Railroad Adjustment Board. In the absence of the findings that are required, of course the Supreme Court has spoken on that subject in *United Pacific Railroad v. Sheehan,* 439 U.S. 89 (1978). Accordingly, the Court finding no error in the proceedings of the District Court which would warrant the reversal of the judgment enter, will order forthwith affirming the judgment of the District Court. We thank you, however, for appearing.

No. 81-3290

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD C. KAISER,
Plaintiff-Appellant,

v.

CONSOLIDATED RAIL CORPORATION, f/k/a PENN CENTRAL TRANSPORTATION; BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Defendant-Appellees.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

Affidavit of Barbara Dutton

I BARBARA DUTTON do hereby certify that the attached type written transcript is a true and accurate record of the cassette tape recording furnished by the Clerk of the United States Court of Appeals of the October 6, 1982 oral argument in *Kaiser v. Consolidated Rail Corp. et al.*, No. 81-3290 (6th Cir. Oct. 21, 1982).

/s/ BARBARA DUTTON
BARBARA DUTTON

Sworn to and subscribed before me this 28th day of March, 1983:

/s/ CATHERINE ALDINGER
Notary Public
[Seal]